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Supreme Court of the United States

October Term, 1972

No. 72-1301

MICHAEL SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Error is set forth in the Petition for Writ of Certiorari in the Appendix, page 1A.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Was the claim that a denial of a preliminary hearing constituted a denial of due process under the Fourteenth

Amendment properly raised before the Virginia Supreme Court and is it properly before this Court?

2. Is there a substantial federal question presented for review by this Court of the search of an automobile pursuant to a search warrant?

3. Should the "Exclusionary Rule" be modified?

STATEMENT OF THE CASE

On the morning of February 15, 1971, Southampton State Farm correctional authorities received information from an unnamed informer that narcotics would be smuggled into the institution in a cake. The authorities were further advised that for thirty dollars additional narcotics could be purchased and brought into the institution. The authorities thereupon supplied thirty dollars in marked bills. Later that same day, Jill Beeson brought a cake to her husband, Randolph Beeson, who was an inmate at the correctional facility. The cake was searched and pieces of tin foil were found which contained a white powdery substance suspected of being a narcotic. Jill Beeson was thereafter found to be in possession of the thirty dollars in marked bills (Tr. 91-96).

The local Sheriff was called to the correctional facility to investigate the automobile being operated by the petitioner. Upon arriving at the institution the Sheriff was met by the Superintendent of Southhampton, and the two approached the automobile in which petitioner was seated on the driver's side. The Superintendent asked the petitioner if he had driven Jill Beeson to the institution to which he received an affirmative reply (Tr. 77-80). The Sheriff requested petitioner to produce his driver's license and registration. Petitioner produced his license and then began

to go into the glove compartment. In going into the glove compartment the petitioner acted in a suspicious manner in that he opened it only wide enough to place his hand inside and was attempting to keep the contents of the glove compartments from observation. The Sheriff asked petitioner what he had in the car to which petitioner responded that it was not a gun. The Sheriff then got into the automobile on the passenger side and placed petitioner under arrest for being an accessory (Tr. 35-38).

The petitioner and his automobile were removed to the county jail at which time the Sheriff and another prison official consulted with the local prosecuting attorney about obtaining a search warrant for the automobile. The prosecuting attorney assisted these officials in preparing an affidavit, and a search warrant was secured from the clerk of the county court (Tr. 70-73).

A search of the automobile was then conducted and the evidence which ultimately resulted in petitioner's convictions was seized.

ARGUMENT AGAINST GRANTING CERTIORARI

I.

The Claim That A Denial Of A Preliminary Hearing Constituted A Denial Of Due Process Under The Fourteenth Amendment Was Not Properly Raised Before The Virginia Supreme Court And Is Not Properly Before This Court.

Prior to trial petitioner moved to quash the indictment on the ground that he had been denied his statutory right to a preliminary hearing. The petitioner never asserted that such a denial would be a denial of due process under the Fourteenth Amendment (Tr. 3-14).

Petitioner assigned as error the trial court's denial of his motion to quash the indictment, however, petitioner never

at any point in his petition for writ of error addressed himself to this point. (See Petition for a Writ of Error.) It is clear that this point has not been presented to the Supreme Court of Virginia.

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra*, and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California*, 401 U.S. 797 (1971).

It is therefore apparent that this Court should not grant the petition for writ of certiorari based upon petitioner's claim that he has been denied due process by not having a preliminary hearing. *Beck* v. *Washington*, 369 U.S. 541 (1962); *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

II.

No Substantial Federal Question Is Presented For Review By This Court Of The Search Of An Automobile Pursuant To A Search Warrant.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Rules of the Supreme Court of the United States.

The questions presented in the Petition for Certiorari are neither special nor important. The questions revolve

around the sufficiency of an affidavit for a search warrant, and deal solely with the application of rules previously announced by this Court in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 393 U.S. 410 (1969).

The trial court was called upon to determine whether the affidavit was sufficient to support the issuance of the search warrant, and upon applying the rules enunciated by this Court held the affidavit to be sufficient. The Supreme Court of Virginia has also approved the affidavit, and a review by this Court will not result in the enunciation of any new rules in the area of search and seizure.

The petitioner claims there is no information in the affidavit to show that the informer was either credible or his information reliable. It is true that there is no information in the affidavit to show how the informer knew the narcotics would be brought to the penal institution. However, the informant had delivered narcotics to the correctional authorities before; he knew that the narcotics would be in a cake, and would be delivered to Randolph Beeson. All of this detailed information was verified by the authorities in addition to their finding the marked money on Jill Beeson. As pointed out in *Spinelli, supra:*

> "... In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416.

Clearly, the detailed information of the informant shows that he came by it through personal knowledge. Compare *Draper* v. *United States,* 358 U.S. 307 (1959).

The petitioner also claims there was no probable cause to search the automobile. The authorities knew that an attempt had been made to introduce narcotics into the penal institution; that Jill Beeson was the person who had attempted to make the introduction of the narcotics; that petitioner has driven Jill Beeson to the institution; that Jill Beeson had been given marked money to supply additional narcotics; and that petitioner acted suspiciously when he was opening the glove compartment of his car.

Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. *Hill* v. *California,* 401 U.S. 797 (1971). Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause for the issuance of a search warrant, and in judging probable cause for the issuance of a search warrant, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. *Spinelli, supra.* The magistrate is obligated to render a judgment based upon a commonsense reading of the entire affidavit. *United States* v. *Ventresca,* 380 U.S. 102 (1964).

The respondent says that probable cause was shown to search the automobile.

The petitioner additionally contends that the search warrant was not issued by a neutral and detached magistrate. The petitioner argues that the Virginia Code sections 19.1-83 and 19.1-84, which deal with search warrants, do not provide for the clerk of a county court to issue a search warrant. The petitioner has failed to point out to this Court that there is another code section which must be considered when determining whether a county court clerk may issue a search warrant. Section 16.1-44 Code of Virginia provides in part:

> "The Clerk shall be a conservator of the peace within the territory for which the court has jurisdiction, and may within such jurisdiction *issue warrants* and processes. . . He may take affidavits and administer oaths . . . and issue all other legal processes which may be issued by the judge of such court. . . ."

Clearly, § 16.1-44 gives the Clerk of the county court the power to issue the same processes which may be issued by the judge. The Virginia Supreme Court has interpreted this section to give the Clerk the authority to issue a search warrant, and this Court must accept the state court's construction of a state statute. *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 648 (1959).

Compare this Court's opinion in *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972), wherein this Court held that the clerk of a municipal court qualified as a neutral and detached magistrate, so as to be authorized under the Fourth Amendment to issue arrest warrants.

The petitioner also maintains that statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were used in the affidavit to support probable cause. The respondent maintains that the statements utilized in the affidavit did not violate *Miranda*. In the alternative the respondent states that the affidavit is still sufficient to support probable cause if the petitioner's statements are excluded from the affidavit.

III.

The "Exclusionary Rule" Should Be Modified.

The "Exclusionary Rule" was created by this Court in *Weeks* v. *United States*, 232 U.S. 383 (1914), and requires the automatic suppression of reliable and probative

tangible evidence which bears directly upon the fact-finding process.

The purpose of this rule is to insure that the law enforcers do not engage in illegal behavior in ferreting out crime. *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Elkins* v. *United States*, 364 U.S. 206 (1960). However laudable this purpose, in reality it is a dismal failure. The policeman on the street cannot be expected to grasp the fine technicalities surrounding probable cause when the Courts are hopelessly divided in applying these technicalities to different factual situations. Chief Justice Burger has aptly summed up the frustrations facing law enforcement officers in the field of search and seizure when he noted in his dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotic Agents*, 304 U.S. 388 (1971):

> "Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity." 403 U.S. at 417.

How much longer can the judicial system withstand the strain of clogged dockets when so much time is spent in suppression hearings which bear little or no relation to the guilt or innocence of the defendant? This case is an excellent example of this waste of judicial efficiency. The motion to suppress in this case occupied most of the Court's time in that it covered 165 pages in the transcript

while the trial itself required less than half that number of pages. Not only has the trial court been required to expend major energies on this matter, but the Supreme Court of Virginia has likewise been required to expend valuable time in reviewing the sufficiency of the search. It is now being asked that this Court also utilize its valuable time to review this matter which bears no relation to the search for truth.

The "Exclusionary Rule" imposes a single, inflexible, and drastic sanction without regard to the nature, circumstances, or degree of the alleged misconduct. Whether the police act in good faith or with the deliberate disregard of the rights of citizens the result is always the same—the evidence is excluded. There is no rational basis for applying the same sanction to an honest mistake and to outrageous misconduct. As Chief Justice Burger stated:

> "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. * * *
>
> "I submit that society has at least as much right to except rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its aquisition." *Bivens, supra,* at 419.

It is now time that this Court recognize the failures of the "Exclusionary Rule" and the frustrations it causes society. The American Law Institute has proposed a model code which would provide that the "Exclusionary Rule" would apply only to a violation of constitutional rights which has been shown to be "substantial."

It is submitted that this Court should reevaluate the "exclusionary rule" and redefine its application.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari or grant the writ for the purpose of reevaluating the "exclusionary rule."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 21st day of June, 1973, I mailed three copies of the foregoing Brief in Opposition to David Ross Rosenfeld and Philip J. Hirschkop, 108 North Columbus Street, P. O. Box 234, Alexandria, Virginia 22313, counsel of record for petitioner.

JAMES E. KULP
Assistant Attorney General